

COVID-19 Long-Haulers May Have Tough Time Getting Long-Term Disability Benefits

By Allen Smith, J.D.

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Individuals with severe COVID-19 symptoms that last for months, known as "COVID-19 long-haulers," may have a difficult time obtaining long-term disability benefits—particularly for such symptoms as brain fog, legal experts say.

"Disability certification is an uphill battle, particularly when there is a subjective element to symptoms," said Jackie Reinberg, national practice leader of absence, disability management and life with WTW, formerly Willis Towers Watson, in Philadelphia.

Plan Language

The starting point of inquiry "is always the plan language: How does the plan define a long-term disability?" noted Marcia Wagner, an attorney with The Wagner Law Group in Boston.

"Some policies set the standard for 'disabled' the same as for Social Security Disability Insurance, which essentially requires the participant to be unable to perform any work," said Andrea Bailey Powers, an attorney with Baker Donelson in Birmingham, Ala. Other policies apply a more lenient standard for the participant to be unable to perform the essential functions of the worker's job. "Thus, under this definition, more individuals will likely qualify as disabled."

Long-term disability plans typically provide coverage for a period expected to last 12 months or longer, Powers noted.

Long-term disability benefits are designed to begin after an "elimination period," which usually runs anywhere from three to six months. During this period, the employee must be unable to perform their essential job functions and must meet the plan's definition of "disabled."

Often after a 24-month period, the standard switches from an "own occupation standard" to an "any occupation standard" that takes into account an individual's circumstances, such as the employee's age, physical condition and education level, Wagner said.

Hurdles for COVID-19 Long-Haulers

"While the 'any occupation standard' may be one hurdle a long-hauler applying for benefits must traverse, there are several others that present potential problems," Wagner said. Because long-haul COVID-19 "is a new medical condition, information about its long-term effects is not available."

She said that there are questions concerning its duration and whether its symptoms may be recurring. "There is no evidence to establish the likely duration of these symptoms or whether different negative symptoms or different combinations of the negative symptoms may last for different periods," she said.

In addition, several of the severe symptoms COVID-19 long-haulers experience, such as brain fog, fatigue, dizziness and headaches, while all potentially disabling, are self-reported. Long-term disability carriers tend to view self-reported symptoms skeptically, as evidenced by carriers' treatment of chronic fatigue syndrome, Wagner said.

Even if a carrier accepts a claimant's statements with respect to self-reported symptoms, the claimant will need to show that these symptoms keep them from satisfying one or more functions of a position for which the employee is qualified, she said.

"Because of the lack of medical data, the claimant may be unable to obtain much in the way of supporting statements from his or her treating physician. The claimant's physician may not even know the appropriate diagnostic code to enter," Wagner noted.

Employee's and Physician's Responsibilities

It is the employee's responsibility to provide proof of loss and disability, Reinberg said.

Almost all long-term disability policies require the claimant to be under the regular care of a physician, noted Juliana Reno, an attorney with Venable in New York City. "Personal narratives are insufficient—the claimant should have medical records showing ongoing examination and treatment."

Reno said that a specific diagnosis of long-haul COVID-19 is helpful to claim coverage under long-term disability benefits. "If possible, the treating physician should explain the differential diagnoses, that is, the steps that were taken to rule out other potential causes."

The claimant's symptoms should be articulated by the treating physician.

"If possible, these should be supported by appropriate testing. For example, if the patient complains of memory loss and inability to concentrate, neurologic or cognitive function testing may be appropriate," she said.

Denial of Disability Benefits Favors Carriers

The manner in which the denial of disability benefits is treated under the Employee Retirement Income Security Act (ERISA) favors carriers, "and carriers take advantage of it," Wagner said.

While long-term disability benefits cases do not have the large dollar settlements found in 401(k) excessive fee litigation, long-term disability claims are one of the most common claims brought in federal courts under ERISA, she noted.

"As a procedural matter, before proceeding to federal court, a long-term disability claimant must first exhaust his or her administrative remedies," Wagner said. By that time, if the symptoms from which the COVID-19 long-hauler was suffering have ceased, the worker may not proceed with appealing.

"Even if long COVID becomes covered under disability policies, it is likely that carriers will impose a cap on the duration of benefits, as are customarily found with respect to mental health benefits," she added.

"These concerns should not exist at the same level with respect to short-term disability," Wagner said. "They are frequently self-insured payroll practices, not subject to ERISA, and their coverage standards are more liberal."

Long-Term Disability Status for COVID-19 Long-Haulers

"Our understanding of long-haul COVID is in its infancy, medically speaking," Reno said. For long-term disability purposes, "claimants may not be able to prove that they have the condition, that their symptoms are real or that their symptoms are truly debilitating."

That said, Powers asked why COVID-19 long-haulers should be treated differently than others seeking long-term disability benefits, aside from the uncertain length of time their complications are expected to last. If a long-hauler has experienced organ damage—such as a heart attack (<https://www.science.org/content/article/covid-19-takes-serious-toll-heart-health-full-year-after-recovery>)—or an increase in the

severity of an autoimmune disease, this might lead to long-term disability benefits more easily than if there are solely symptoms like fatigue or brain fog, she noted.

Powers added that COVID-19 long-haulers are entitled to the same protections from discrimination as any other person with a disability under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and Section 1557 of the Patient Protection and Affordable Care Act.

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